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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1928.

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,
vs.
EDWARD H. JOHNSON,
Respondent.
No. 455

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,
vs.
MYRTLE J. JOHNSON,
Respondent.
No. 456

PETITION FOR WRITS OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

SIDNEY C. MURRAY,
ALBERT S. MARLEY,
MARVIN A. JERSILD,
Counsel for Petitioner.

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PETITION FOR WRITS OF CERTIORARI TO BE ADDRESSED TO THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Statement of matter involved.

Your petitioner, New York Central Railroad Company, respectfully represents that the Circuit Court of Appeals for the Eighth Circuit has affirmed judgments entered by the District Court of the United States for the Western District of Missouri, Western Division, in favor of the respondents, Myrtle J. Johnson and Edward H. Johnson, her husband, re-

spectively, for damages for injuries alleged to have been sustained by the respondent, Myrtle J. Johnson, on September 27, 1925, while a passenger on one of petitioner's trains. The cases were tried together in the District Court and were considered on one record in the Circuit Court of Appeals. (The opinion, not yet reported, appears in the Appendix at page 25, *post*.)

Confident that it can demonstrate to this Honorable Court that the record shows no grounds upon which a recovery in these cases can be sustained and that it did not secure a fair and impartial trial, your petitioner submits that writs of certiorari should be granted, because the Circuit Court of Appeals by its decision has decided an important question of general law in a way conflicting with decisions of other Circuit Courts of Appeals and has based its decision on an erroneous statement of law, conflicting with decisions of this Court, and because it has so far sanctioned a departure by a lower court from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

Statement of the case.

The declarations in each case charged that while Myrtle J. Johnson was a passenger for hire and when the train was between Utica and Syracuse the petitioner negligently caused and permitted the car in which she was riding to "suddenly violently and unusually surge, lurch, jerk, jolt, sway, tilt and rock" as a result of which negligence she was caused to fall and thereby injured. (R. 6-10.) There was no direct evidence of negligence. The cases were submitted to the jury and the judgments affirmed by the Circuit Court of Appeals on the theory that the doctrine of *res ipsa loquitur* applied.

Between 11:00 and 12:00 o'clock in the evening, after all but the night lights had been extinguished, (R. 107), Myrtle

J. Johnson and her sister-in-law, Imogene Johnson, who were passengers on one of petitioner's fast trains enroute from Harmon, New York, to Chicago, left the club car of the train and went to their berth to retire for the night (R. 107). While Imogene Johnson was seated on the side of the berth, reaching for her night clothes, which were in a suitcase at the foot of the berth (R. 275), and while Myrtle Johnson was standing in the aisle near the foot of the berth, holding in her right hand several folds of the curtain (R. 108, 274), there came what the former described as "the most terrible jerk, almost as though the train were going to stop, but didn't, and jerked and swayed and went on" (R. 108), and what the latter described as "an awful jerk and jolt and a terrific lurch" (R. 275). These movements, Myrtle Johnson testified, threw her body around and her head against the edge of the upper berth (R. 276). Imogene Johnson found her in the aisle complaining about her head (R. 109). She assisted her to bed, where both ladies slept until nearly noon the next day (R. 146). Imogene Johnson, upon awakening, found that her sister-in-law was ill (R. 114). While a total of twenty-one witnesses testified for the respondents in regard to the physical condition of Myrtle Johnson, there were no witnesses to the actual occurrence except these two ladies. Six members of the train crew, however, testified that there was no unusual jerk or jar. (R. 393, 383, 386, 395, 398-399, 408.) The train was running at its usual rate of speed (R. 393).

In their address to the jury both counsel for respondents stated that the defense was that Myrtle Johnson had the syphilis and such statements as these were made:

> "The vilest defense made in this case, a defense which would bar that girl from all society, intimated in this case that she had the syphilis. That is the defense in this case, that she had the syphilis. Gentlemen of the jury, they would charge her with a disease which would brand her as bad as a leper and exclude her from the

> society of decent people. That is the kind of a defense that is in this case, and I resent it. I resent the New York Central coming into this town and saying that that girl has the syphilis and trying to make this jury believe that she has the syphilis." (R. 421, 422.)
>
> "Never again will you ever dare to put that letter of syphilis upon the brow of a decent woman." (R. 435.)

and as the Circuit Court of Appeals states, proceeded to dilate on and exploit this text *with no justification for the assumption* or for the verbal pyrotechnics that counsel were permitted to indulge in over the objections of the attorneys for the petitioner. (*Post* 31.)

Objections were duly made to the introduction of any evidence under the pleadings (R. 93) and to testimony relating to the character of the jerks and jolts of the car (R. 111, 315, 316); motions to direct verdicts for the defendant were made at the conclusion of plaintiff's case (R. 375, 376) and again at the conclusion of all of the evidence (R. 24, 419). Objections were also made to the above mentioned argument to the jury and to the instructions to the jury applying the doctrine of *res ipsa loquitur* to these cases. (R. 451-458.)

The jury brought in verdicts for the plaintiffs for the full amount sued for in each case—$25,000 in Myrtle Johnson's case and $10,000 in her husband's case—upon which verdicts judgments were entered (R. 25). On writs of error, review was had by the Circuit Court of Appeals, Eighth Circuit, and that Court, on July 2, 1928, affirmed both judgments. (R. 480.)

There is involved in these cases, an important question of general law, viz., does the doctrine of *res ipsa loquitur* apply to a case where a passenger charges that he has sustained injuries due to the lurching or swaying of a train and the proof shows that such movements occurred not when the train was starting or stopping, but while it was proceeding at its usual speed between two stations and when no evi-

dence of an accident to the car or train is produced. In other words may a presumption of negligence be based upon opinion evidence as to the character of such movements when all evidence of physical facts is consistent with the exercise of due care by the carrier. Heretofore, when Federal Courts have had occasion to consider this question, the answer has been in the negative. *Norfolk & W. Ry. Co.* v. *Birchett*, Fourth Circuit, 252 Fed. 512; *Ozanne* v. *Illinois Central R. Co.*, 151 Fed. 900, affirmed by Sixth Circuit in 157 Fed. 1004.

Petitioner is advised that a careful investigation of cases decided by this Court and the Circuit Court of Appeals, reveals no instance in which *res ipsa loquitur* has been extended to a case like the instant cases. "The only presumptions of fact which the law recognizes are immediate inferences from *facts* proved" and it is only where these facts show the circumstances attendant upon an "accident" to be of such a character as to justify a jury in inferring negligence as the cause of an injury that such an inference may be made. The Circuit Court of Appeals held that negligence may be presumed from the fact of injury alone. Even if the circumstances in these cases are considered, the effect of the decision is that negligence may be presumed from a result which common experience shows may be and generally is due to no negligence whatever. To reach its decision, the Circuit Court of Appeals, ignoring this Court's definition of the doctrine *res ipsa loquitur*, defined this doctrine as follows:

> "that is; the train being under the sole control of the carrier and a passenger is injured without negligence on his part, a presumption based on past experience arises, that the occurrence was an unusual one, and would not have happened had the carrier used that high degree of care in operating the train that the law imposes upon it," (*Post* 28)

stated that the doctrine applied in these cases and thereupon held that the plaintiffs had made a case entitling them to go to the jury.

Another important question in these cases is whether verdicts are to be sustained when secured by argument to the jury which the Circuit Court of Appeals "deemed it proper to observe was likely to create prejudice." (*Post* 31.)

Reasons relied upon for granting writs of certiorari.

Wherefore, and for additional reasons hereafter set forth in counsel's brief, your petitioner says review upon the granting of writs of certiorari is proper, for that:

1. The Circuit Court of Appeals has decided an important question of general law, in a way conflicting with decisions of the Supreme Court of the United States in that the Circuit Court of Appeals defines the doctrine of *res ipsa loquitur* as follows:

> "The train being under the sole control of the carrier and a passenger is injured without negligence on his part, a presumption based on past experience arises, that the occurrence was an unusual one, and would not have happened had the carrier used that high degree of care in operating its train that the law imposes upon it." (*Post* 28.)

whereas the United States Supreme Court has made one of these conclusions a condition to the application of the rule and has thus stated the doctrine:

> "When a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur, if the one having control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care." (*San Juan Light Co.* v. *Requena*, 224 U. S. 89, 98; *Sweeney* v. *Erving*, 228 U. S. 233.)

2. The Circuit Court of Appeals by its decision thus conflicting with the decisions of this Honorable Court has erroneously applied the doctrine of *res ipsa loquitur* to the

facts in these cases without which there are no grounds for recovery.

3. The Circuit Court of Appeals in its decision has decided an important question of general law in a way conflicting with decisions of other Circuit Courts of Appeals, in that by its decision it has held that evidence of a physical injury to a passenger in a car under the control of a carrier, together with statements that such injury was caused by the unusual jerking and lurching of the car in which the passenger was riding is sufficient to make a *prima facie* case, whereas the Circuit Court of Appeals for the Fourth and Sixth Circuits have held that proof of such injury, together with similar statements does not bring a case within the doctrine of *res ipsa loquitur* and in the absence of evidence of the carrier's negligence does not entitle a passenger to damages.

4. The Circuit Court of Appeals by its decision holding that the improper argument to the jury by both counsel for respondents was likely to create prejudice and its inconsistent order affirming the judgments of the lower courts has so far sanctioned such a departure by a lower court from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

Your petitioner, therefore, respectfully prays that writs of certiorari be issued under the seal of the Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding the said Court to certify and send to this Court a full and complete transcript of the record and all the proceedings of the said Circuit Court of Appeals had in these cases, entitled *New York Central Railroad Company* v. *Edward H. Johnson* and *New York Central Railroad Company* v. *Myrtle J. Johnson*, numbers 8020 and 8021 respectively on the dockets of said Court, to the end that these causes may be reviewed and determined by this Honorable Court; and that said judgments and the orders of said Circuit Court of Appeals be reversed, and it also prays for such

other, further or different remedies and relief in the premises as to this Court may seem appropriate and in conformity with law; and your petitioner will ever pray, etc.

NEW YORK CENTRAL RAILROAD COMPANY,

By .....

General Attorney.

SIDNEY C. MURRAY,
ALBERT S. MARLEY,
MARVIN A. JERSILD,
Counsel.

Sidney C. Murray, being duly sworn, makes oath that he is general attorney and counsel for the petitioner in the above entitled cause and that he has prepared the foregoing petition and that the allegations therein are true as he verily believes.

.....

Subscribed and sworn to before me this ..... day of September, A. D. 1928.

.....

Notary Public.

The undersigned, duly admitted to practice in the Supreme Court of the United States, certifies that he has examined the foregoing petition for writs of certiorari; that the petition is not made for delay, but, in the opinion of the undersigned is wholly meritorious and ought to be granted.

Chicago, Illinois, September ....., 1928.

.....

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

MAY IT PLEASE THE COURT:

The opinion of the Circuit Court of Appeals in these cases is not yet reported. It will be found in the record at page 474 and appears in the appendix hereto, *post* 25.

Grounds on which jurisdiction of this Court is invoked.

The opinion of the Circuit Court of Appeals was filed July 2, 1928, and on that day orders were entered affirming the judgments of the District Court. (R. 480.)

In the Circuit Court of Appeals as well as in the District Court, the petitioner contended that these cases were not proper ones for the application of the doctrine, *res ipsa loquitur*. It was contended that verdicts should have been directed for the petitioner (R. 44, 68, 375, 419); that those portions of the trial Judge's charge to the jury which were predicated on the doctrine of *res ipsa loquitur* were erroneous (R. 47, 49, 50, 70, 72, 73, 74, 442, 450-456); and that evidence in regard to lurching and swaying should have been excluded. (R. 41, 43, 66, 67, 111, 112, 315, 316.) The argument to the jury that "the defense was syphilis" and that the defendant was "trying to put the stigma of indecency upon this young woman" was objected to in the District Court (R. 422, 434, 435) and it was assigned as error in the Circuit Court of Appeals. (R. 45, 46, 69-71.) The Circuit Court of Appeals held that the doctrine of *res ipsa loquitur* applied in these cases and that the plaintiffs made a *prima facie* case and that the Court's charge to the jury was not incorrect. It further held that there was no justi-

fication for the assumption that the defense was syphilis, nor for the "verbal pyrotechnics that counsel were permitted to indulge in over the objection" of petitioner and that "this line of argument was likely to create prejudice," but nevertheless affirmed the judgments.

This Court has jurisdiction to grant writs of certiorari in these cases by virtue of Section 240 of the Judicial Code, as amended February 13, 1925. (28 U. S. C. A. 347; 43 Stat. 938.) The case of *Northern Ry. Co.* v. *Page*, 274 U. S. 65, is believed to sustain the jurisdiction of the Court. That case was considered on a writ of certiorari (269 U. S. 542) to the Circuit Court of Appeals for the First Circuit. It was an action to recover damages for personal injuries sustained by the plaintiff while a passenger on a railway train.

Statement of the Case.

Your petitioner respectfully refers to "Statement of the Case" set forth in the foregoing petition for certiorari, pages 2 to 5, which statement of the case is incorporated herein by reference. For convenience the respondents and petitioner will be called respectively, plaintiffs and defendant.

Specification of Assigned Error Intended to be Argued.

The errors intended to be argued are those heretofore mentioned and they may be briefly summarized and considered under these two headings:

1. The doctrine *res ipsa loquitur* was improperly applied to these cases. Without the presumption, invoked by virtue of this doctrine, there was no ground for holding the defendant liable.

2. The argument to the jury by plaintiff's counsel was prejudicial, deprived the defendant of a fair and impartial trial and entitles it to a reversal.

ARGUMENT.

I.

The doctrine, res ipsa loquitur was improperly applied in these cases.

A.

The mere happening of an injurious accident to a passenger without his fault does not raise the presumption of a carrier's negligence.

The Circuit Court of Appeals in these cases has held that when "a passenger is injured without negligence on his part, a presumption based on past experience arises, that the occurrence was unusual and would not have happened" had the carrier used proper care. The cases cited by the Court demonstrate the incorrectness of this statement. In the earlier opinions of this Court there is language which, if considered apart from the facts and circumstances with reference to which the opinions were announced, might support the rule that proof of an injury to a passenger without fault on his part raises a presumption of negligence. After reviewing these cases, Judge Lurton said the following in *C. N. O. & T. P. Ry. Co.* v. *South Fork Coal Co.*, 139 Fed. 528, 533, cited by the Court:

> "Now it is clear that the learned justice did not mean that a presumption of negligence would arise upon mere proof of an injury to a passenger without any regard to the nature of the injury or the circumstances connecting the carrier with its infliction."

In *Transportation Company* v. *Downer*, 11 Wall. 129, 134, also cited by the Court, Mr. Justice Field said:

> "A presumption of negligence from the simple occurrence of an accident seldom arises, except where the

> accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible."

So also in *Sweeney* v. *Erving*, 228 U. S. 233, 238, also cited by the Court, this Court said:

> "The general rule in actions of negligence is that the mere proof of an 'accident' (using the word in the loose and popular sense) does not raise any presumption of negligence; but in the application of this rule, it is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed, by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said, *res ipsa loquitur*—the thing speaks for itself. * * *"

In *San Juan Light Co.* v. *Requena*, 224 U. S. 89, 98, also cited by the Court, the rule *res ipsa loquitur* was thus stated:

> "When a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care."

It is apparent, therefore, that the test in determining whether this defendant's negligence may be presumed, is not whether an "accident" happened, but whether the circumstances of the occurrence were of a character to give ground for a reasonable inference that, if due care had been employed by the defendant, it would not have happened, or whether the "injury" is such as in the ordinary course of things does not occur, if the carrier uses proper care.

B.

The United States Courts have not extended the rule of *res ipsa loquitur* to cases where an injury is shown to have resulted from lurching, jerking or swaying of cars and neither the cases cited by the Circuit Court of Appeals nor the circumstances of this occurrence authorize its application in these cases.

The evidence shows that Imogene Johnson was sitting on the side of the berth near the pillows, leaning towards the suit case at the foot of the berth (R. 275) and reaching for their night clothes (R. 107-109), and Myrtle Johnson was standing in the aisle, her left hand on her hip, her right hand "sort of placed in the partition at the foot of the berth" (R. 108), and holding in this hand several folds of the curtain when the movements described by them occurred. These movements caused the former to fall across toward the foot of the berth (R. 108) and caused Myrtle Johnson to swing or pivot around with the curtain (R. 304, 306, 145) until her head struck the upper berth, after which she fell to the floor and was found sitting three or four feet from where she had been standing (R. 109). Both witnesses say they were thrown, but even so, there is nothing to indicate that the results were not those which might not naturally have followed such lurches as occur when a railroad company exercises that high degree of care required of it. Both ladies were in such positions that an ordinary lurch of the train could cause them to lose their balance. It would be natural for the one, under such circumstances, to fall forward in the direction in which she was reaching, and for the other to swing around, if after losing her equilibrium, she retained her hold on the curtain. After having struck her head, she, of course, fell. If she had been violently thrown, she would, without a doubt, have been some distance from the place she first occupied, instead of being about the distance from it which she would have traveled in pivoting around on the curtain.

We have carefully examined decisions of this Court and of lower federal courts and have found no case in which the doctrine *res ipsa loquitur* has been applied to such an occurrence as shown by the evidence in these cases. As indicated above, there are statements in opinions which, considered alone, would permit the application of the rule here but in the cases in which the rule was so broadly stated, the circumstances of the "accident" have been such that the presumption of negligence would have arisen therefrom.

One class of cases involves derailments, collisions and breaking of equipment or appliances. It is apparent that such accidents do not ordinarily occur if the carrier exercises that degree of care required of it. In them, it is said the accident itself is indicative of negligence.

There is another class of cases where the facts show that the train was suddenly started or suddenly stopped while the passenger was boarding or leaving the train. In them, it appears to us, the very question is whether it was negligent to start suddenly or to stop suddenly and thus deprive a passenger of a reasonable opportunity to board the train or to leave the train. There, mere proof of an unusual lurch or jerk is proof of negligence and no occasion for a presumption of negligence arises. But such cases do not support the application of the rule to the instant cases. Here the train was proceeding at its usual rate of speed between two stations (R. 393). The train was not stopping for a station nor was the plaintiff in the act of leaving the train.

We shall briefly review the cases cited by the Circuit Court of Appeals. As has been shown, the principles laid down in the cases of *San Juan Light & T. Co.* v. *Requena*, 224 U. S. 89; *Sweeney* v. *Erving*, 228 U. S. 233; *Transportation Company* v. *Downer*, 11 Wall. 129; and *C. N. O. & T. P. Ry. Co.* v. *South Fork Coal Company*, 139 Fed. 528, are the principles which we are contending for in the instant cases. The facts in these cases, however, do not aid in a solution of the ques-

tions here involved. The *Requena case* related to an injury caused by an electric shock; the *Sweeney case* to injuries caused by burns resulting from an X-ray operation and the *Downer case* involved the loss of a shipment of coffee transported on one of the defendant's boats.

In *Mendelson* v. *Davis* (8th C. C. A.), 281 Fed. 18, a passenger fell through an open trap-door and in *Lee Line Steamers* v. *Robinson* (6th C. C. A.), 218 Fed. 559, a passenger was stabbed by an employe of the carrier. In *C. C. C. & St. L. Ry. Co.* v. *Hadley*, 82 N. E. 1025, a passenger sustained injuries when a window fell on her because of a defective window catch.

C. N. O. & T. P. Ry. Co. v. *South Fork Coal Company*, 139 Fed. 528, involved the liability for destruction of timber by fire alleged to have been caused by the railroad company when oil contained in tank cars was ignited following a collision between two trains and the telescoping of the tank cars. In that case, Judge Lurton reviewed many cases relating to the subject under discussion. He examined *Stokes* v. *Saltonstall*, 13 Pet. 181, a case where a passenger was injured when a stage coach was upset, and *Railroad Company* v. *Pollard*, 22 Wall. 341, where a passenger was injured when, during switching operations, a car was bumped against the one she occupied, and demonstrated that these cases do not support the rule as it is stated by the Circuit Court of Appeals in these cases. Judge Lurton there said:

> "In passenger cases, as in other cases, the question at last is whether an inference of negligence may be logically inferred from the circumstances of the particular injury." (Citing authorities p. 534.)

and after discussing cases involving collisions, derailments, defective appliances and fires started by sparks, said:

> "But where the character of the accident is such as to strongly point to a cause which is abnormal and negligent, it devolves upon the defendant to explain that that abnormal cause was not due to want of due care."

It will thus be seen that the cases cited by the lower court do not support its conclusions.

In *Chicago, M. & St. P. Ry. Co.* v. *Irving*, (9th C. C. A.), 234 Fed. 562, 566, the Court quotes the following from *Griffen* v. *Manice*, 166 N. Y. 188, 59 N. E. 925:

> "If a passenger in a car is injured by striking the seat in front of him, that, of itself, authorizes no inference of negligence. If it be shown, however, that he was precipitated against the seat by reason of the train coming in collision with another train, or in consequence of the car being derailed, the presumption of negligence arises. The *res*, therefore, includes the attending circumstances, and, so defined, the application of the rule presents principally the question of the sufficiency of circumstantial evidence to establish, or to justify the jury in inferring, the existence of the traversable or principal fact in issue, the defendant's negligence."

A significant characteristic of collision, derailment and defective appliance cases is that in them there is a physical change of position or condition of the train or the car of such a character as enables a witness to reproduce by language a true picture thereof and this change in turn having injured the plaintiff, an explanation is demanded of the carrier, not as to why the passenger fell or was injured, but an explanation as to what caused its cars to leave the track, or what caused its train to collide with another train or vehicle, or what caused its equipment or appliances to give way. The distinction made between such cases and the instant cases is that in the former there is evidence of a physical fact, whereas in the latter, there is merely an expression of opinion as to the nature and character of a momentary sensation. The former obviously furnishes something definite upon which to base an inference, while the latter leaves the matter in the realm of conjecture and speculation. "No inference of fact or of law is reliable drawn from premises which are uncertain." *U. S.* v. *Rose*, 92 U. S. 281, 283.

Furthermore, a collision, derailment or the breaking of appliances does not ordinarily occur, except when the carrier is negligent, but it is a matter of common knowledge that lurching, jerking and swaying of cars takes place on all fast trains. The possibility of such movements is an ordinary incident of railroad travel—a consequence of the operation of counteracting forces—which a passenger must expect. That the movements described in the instant cases were acts of negligence or evidence of negligence is a matter of speculation and not a legitimate inference. This Court has held that a verdict cannot be sustained if essential facts are left in the realm of conjecture and speculation. *Northern Ry. Co.* v. *Page*, 274 U. S. 65, 73; *Gulf M. & N. R. Co.* v. *Wells*, ... U. S. ....., 72 L. Ed. 152, 154.

In the last mentioned case, it was urged that the question of negligence was properly submitted to the jury because of an inference to be drawn from plaintiff's statement that "the engine gave an unusual jerk" which was more severe than any he had ever seen or experienced on a local freight train. This Court refused to sustain that contention, holding that plaintiff's statement was "obviously, a mere conjecture," and his opinion that the jerk was unusual and severe "had no substantial weight." There were circumstances in that case which are not present in the instant cases. However, it has been repeatedly held by courts of high authority that statements describing a lurch, jolt or jar as "violent," "terrible," "awful," "very severe," "unexpected," "extraordinary," "unusual," and "worse than usual," unless accompanied by evidence showing negligence, are insufficient to make a case. They are said to be mere expletive or declamatory words or phrases, "depending generally upon the degree of nervous emotion, exuberance of diction and volatility of imagination of the witness," and not evidence of physical facts. *Foley* v. *B. & M. R. Co.*, 193 Mass. 332, 335, 79 N. E. 765; *Bollinger* v. *Railway Co.*, 98 N. Y. S. 641; *Wein-*

schenk v. *Railroad Co.*, 190 Mass. 250, 76 N. E. 662; *Delaney* v. *Buffalo R. & P. Ry. Co.*, 266 Pa. 122, 109 Atl. 605; *Walsh* v. *Boston El. Ry.*, 256 Mass. 17, 152 N. E. 64.

Where, as in the instant cases, the circumstances attending the occurrence are at least as consonant with full performance by the carrier of its duty as that it was negligent, there can be no logical inference of negligence from the occurrence itself and it ought not to be left to the conjecture of a jury.

C.

The decision of the Circuit Court of Appeals conflicts with applicable decisions of other Circuit Courts of Appeals.

In *Norfolk & W. Ry. Co.* v. *Birchett* (4th C. C. A.), 252 Fed. 512, the plaintiff had secured a judgment in the lower court which was reversed by the Circuit Court of Appeals. The accident occurred while the plaintiff, who had traveled a good deal, was in the dressing room of the Pullman car. She testified that she was firmly seated in a chair, when a "terrific lurch" came and "just threw her across the room" —just as if a football had been kicked across the room. The chair was overturned. She describes the lurch as "great," "violent" and as occurring very suddenly. The Court there said:

> "The foregoing summary makes it apparent that plaintiff's case rests wholly upon the fact that she fell, and her characterization, as a witness in her own behalf, of the car movement that caused the fall. Aside from the fact itself and the adjectives she uses, there is nothing of record which even suggests, much less tends to prove, that the train in question was improperly or unskillfully handled. • • • The doctrine of *res ipsa loquitur*, upon which plaintiff really relies, has but limited application to a case of this kind. The injury for which she sues did not result from collision or derailment, or from the improper character or unsafe condition of any part of the train equipment. It must have been occasioned, as seems to us clearly established, by one or more of those

car movements or motions, by whatever name called, which necessarily attend the most careful operation of fast passenger trains. In such case, where the accident is to the passenger, and not to the car or train, it has been held by courts of high authority that a presumption of negligence does not arise. *Herstine* v. *Lehigh Valley R. Co.*, 151 Pa. 244, 25 Atl. 104; *Weinschenk* v. *N. Y., N. H. & H. R. R. Co.*, 190 Mass. 250, 76 N. E. 662; *Denver & R. G. R. Co.* v. *Fotheringham*, 17 Colo. App. 410, 68 Pac. 978; *Nelson* v. *Lehigh Valley R. Co.*, 25 App. Div. 535; 50 N. Y. Supp. 63."

The Court thereupon quotes from cases and also shows that its ruling is not in conflict with *Railroad Company* v. *Pollard*, 22 Wall. 341, or *Stokes* v. *Saltonstall*, 13 Pet. 181, and concludes as follows:

"The plaintiff has cited no authority, and we have found none, which sustains her contention. The fact that she fell, under circumstances not seriously in dispute, does not make out a prima facie case of negligence, and her characterization of the car movement which caused the fall adds nothing from which negligence can be legitimately inferred."

In *Ozanne* v. *Illinois Central R. Co.*, 151 Fed. 900 (affirmed by Circuit Court of Appeals for Sixth Circuit (157 Fed. 1004), a verdict was directed for the defendant. There the plaintiff was in the ladies' dressing room of a Pullman car when the car lurched or swerved, causing her to fall and break her hip. The Court there said:

"But whilst the carrier must rigidly perform all of these duties, the natural laws of motion superadd risks which the carrier cannot always guard against, even by the use of the utmost care, and such risks as those the passenger must be supposed to assume. The railroad track cannot always be straight. The transit of its trains must be rapid, and the swing of a car is inevitable when the train passes over a curve. This is unavoidable, and the consequences of it is one of the risks we have referred to. To say the least, the testimony in this case is overwhelming, if indeed it is not entirely uncontradicted, that the defendant, in respect to its cars, its

trains, and the management thereof, came up to the standard of duty just indicated. In any event, the testimony is clear that no sort of negligence can fairly be imputed to the defendant, although, as we have seen, it is essential to entitle a plaintiff to recover to show by substantive proof that there was some negligence."

To cite decisions of State Courts supporting the above cases would unduly lengthen this argument.

II

The prejudicial argument to the jury deprived the defendant of its right to a fair and impartial trial.

Over the objections and exceptions of defendant's attorney, and without "justification for their assumption" plaintiff's counsel made the following argument to the jury:

"But gentlemen, the vilest defense made in this case, a defense which would bar that girl from all society, intimated in this case that she had the syphilis. That is the defense in this case, that she had the syphilis. Gentlemen of the jury, they would charge her with a disease which would brand her as bad as a leper and exclude her from the society of decent people. That is the kind of a defense that is in this case, and I resent it. I resent the New York Central coming into this town and saying that that girl has the syphilis and trying to make this jury believe that she has the syphilis." (R. 421-422.)

"Now, I want to get some more things to you. You note that Mr. Chilcott said in his opening statement: 'I only know from rumor what the defense in this case may be, but we will be able to meet it'; and just the moment that counsel for the defendant began to interrogate these witnesses with reference to the condition of the blood I made up my mind I would meet it right there. They never for one minute had an idea that we would put Dr. Geraughty on the stand, so that they couldn't come before this jury and say, 'Why didn't you bring that man?' You mean to tell me when a man knows all about arach-

noids and pia mater and dura mater and all about those things, that he hadn't prepared this defense and worked it out from start to finish? You mean to tell me he didn't talk to those doctors about it? You mean to tell me that he didn't interpose an objection to a witness here when I asked him about somebody who went to see Geraughty or went to see Dr. Sanders from the New York Central? That he wasn't aware of that, and he wasn't trying to put the stigma of indecency upon this young woman in his defense? You mean to say that he wasn't aware of that situation?

Oh, I have been too long in this business of trying law suits not to know that. So I immediately came to the front and exposed him, and proved it to the hilt; so much so that they stopped. Then they started with the colored man. Never again will you ever dare to put that letter of syphilis upon the brow of a decent woman." (R. 434.)

There is nothing in the record showing that the subject of syphilis was introduced by the defendant, or that its defense was syphilis. Indeed, counsel for the plaintiffs, who had been "long in this business of trying lawsuits" must have known that there could be no such defense in this case. (*Mathew* v. *Wabash R. Co.*, 78 S. W. 271, 115 Mo. App. 468, affd. 199 U. S. 605. The Little Silver, 189 Fed. 980, 986; *Hilliard* v. *Chicago R. Co.*, 163 Ill. App. 282, 289.) By this argument counsel sought to make the jury believe that the defendant was charging this woman with this loathsome venereal disease. The effect of such argument was obviously to prejudice the jury against the defendant not only on the question of damages—the full amount sued for was returned in each case—but on the question of liability. If the theory of the Circuit Court of Appeals and the trial Court is correct, namely, that the jury might infer negligence from the occurrence, obviously the defendant was prejudiced the more by such argument. The Circuit Court of Appeals states: "We therefore deem it proper to observe that this line of argument was likely to create prejudice" and nevertheless affirmed the judgments.

In so doing, it so far sanctioned such a departure by a lower court from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision. The late Judge Sanborn in *Union Pacific R. Co.* v. *Field*, 137 Fed. 14, 15, said the following:

> "Under our system of jurisprudence it is the province of the jury in actions at law to try and determine the rights of parties according to the law and the evidence. It is the duty of the court and of its officers, the counsel of the parties, to prevent the jury from the consideration of extraneous issues, of irrelevant evidence, and of erroneous views of the law, to guard it against the influence of passion and prejudice, and to assure to the litigants a fair and impartial trial. An omission by court or counsel to discharge this duty or a persistent violation of it, is a fatal error, because it makes the trial unfair. The property of a defendant may not be lawfully transferred to a plaintiff without an impartial trial of the controversies between them. A trial is not fair and impartial in which a discussion of irrelevant issues, a statement of a persuasive but immaterial fact, or the assertion or insinuation of an erroneous view of the law or of the wrong measure of damages by counsel in his address to the jury, may have had an influence favorable to his client. * * *
>
> It is exceedingly difficult to withdraw from the minds of jurors, or from any mind, suggestions of immaterial facts, insinuations of misleading rules of action, or arguments which arouse passion or prejudice; and yet in cases in which the address of counsel conveys suggestions of this nature to the minds of the triers of the facts it is only when it is certain that these have been withdrawn that the trial is fair and impartial. It is therefore of the gravest importance that the conveyance of such suggestions to their minds should be prevented at the very threshold of the attempt, and that court and counsel should guard the jury with zealous care against all illegal, improper, or unfair arguments or suggestions. *Waldron* v. *Waldron*, 156 U. S. 361, 367, 383, 384, 15 Sup. Ct. 383, 39 L. Ed. 453; *Graves* v. *U. S.*, 150 U. S. 118, 120, 14 Sup. Ct. 40, 37 L. Ed. 1021; *Hall* v. *U. S.*, 150 U. S. 76, 14 Sup. Ct. 22, 37 L. Ed. 1003; *Wilson* v. *U. S.*, 149 U. S. 60, 68, 13 Sup. Ct. 765, 37 L. Ed. 650; *St. Louis*

& S. F. Ry. Co. v. *Farr*, 6 C. C. A. 211, 216, 217, 56 Fed. 994, 1000; *St. Louis & S. F. Ry. Co.* v. *Bennett*, 16 C. C. A. 300, 305, 69 Fed. 525, 529, 530; *Cudahy Packing Co.* v. *Skoumal*, 60 C. C. A. 306, 313, 125 Fed. 470, 477; *Bullard* v. *Boston & M. R. Co.*, 64 N. H. 27, 5 Atl. 838, 840, 10 Am. St. Rep. 367; *Perkins* v. *Burley*, 64 N. H. 524, 15 Atl. 21; *Magoon* v. *Boston & M. R. Co.* (Vt.) 31 Atl. 156, 163; *State* v. *Hamett*, 54 Vt. 83, 89; *Brown* v. *Swineford*, 44 Wis. 282, 294, 28 Am. Rep. 582; *Mitchum* v. *State of Georgie*, 11 Ga. 615."

Writs of certiorari should be granted and review of these cases should be permitted to correct these errors.

1. The Circuit Court of Appeals has decided an important question of general law, in a way conflicting with decisions of the Supreme Court of the United States in that the Circuit Court of Appeals has stated that the fact that a passenger is injured without negligence on his part raises a presumption of negligence on the carrier's part, whereas this Court has held that in addition to the above it must appear that the injury is such as in the ordinary course of things does not occur, if the one having control uses proper care.

2. The Circuit Court of Appeals by its decision thus conflicting with decisions of this honorable Court has erroneously applied the doctrine of *res ipsa loquitur* to the facts in those cases.

3. The Circuit Court of Appeals in its decision has decided an important question of general law in a way conflicting with decisions of other Circuit Courts of Appeals, in that by its decision it has held that evidence of a physical injury to a passenger in a car under the control of a carrier, together with statements that such injury was caused by the lurching and swaying of the car in which the passenger was riding is sufficient to make a *prima facie* case, whereas the Circuit Court of Appeals for the fourth and sixth circuits have held that proof of such injury, together with such state-

ments does not bring a case within the doctrine of *res ipsa loquitur* and in the absence of evidence of the carrier's negligence does not entitle a passenger to damages.

4. The Circuit Court of Appeals by its decision, holding that the improper argument to the jury by both counsel for respondents was likely to create prejudice and its inconsistent order affirming the judgments of the lower courts, has so far sanctioned such a departure by a lower court from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

Respectfully submitted,

SIDNEY C. MURRAY,
ALBERT S. MARLEY,
MARVIN A. JERSILD,
Counsel for Petitioner.

APPENDIX.

Opinion of Circuit Court of Appeals.

Before Kenyon, Circuit Judge, and Symes and Martineau, District Judges.

Symes, District Judge, delivered the opinion of the Court.

These two cases are here by separate writs of error sued out by the railroad company, from separate judgments entered in the District Court of the United States for the Western District of Missouri, in favor of the respective plaintiffs below, defendants in error here. The two actions were consolidated, tried as one, and the errors complained of are the same in both.

No. 8020 was brought by Edward H. Johnson to recover damages, as the husband of Myrtle J. Johnson, for injuries alleged to have been sustained by her, while riding on one of defendant's trains as a passenger, by reason of alleged negligence of the railroad company.

In No. 8021, Myrtle J. Johnson, plaintiff below, seeks to recover damages alleged to have been suffered by her, by reason of the same alleged negligence of the railroad company.

Myrtle J. Johnson, in company with her sister-in-law, Imogene Johnson, was riding on a so-called "extra fare, solid Pullman train" of the defendant company, en route from Harmon, New York, to Chicago, Illinois. The ladies spent the evening in the club car and between 11 and 12 P. M. repaired to their berth, lower 8, car 64, located on the right hand side of the train as it traveled west. Imogene Johnson seated herself on the edge of the berth with a suitcase open

before her, taking out their night clothes, when, according to the evidence of the two ladies, the speed of the train was suddenly checked, and then accelerated. At the same time Myrtle J. Johnson was standing in the aisle near the foot of the berth, holding in her right hand several folds of the curtains in order to steady herself, facing and talking to Imogene. The two women describe what happened as a terrible jerk, as though the train was going to stop, but did not; then a yank, and that the train lurched as it went on again. Imogene Johnson fell across the berth and towards the foot, while Myrtle was thrown three or four feet into the aisle of the sleeper towards the opposite berth. Myrtle testified:

"I was standing there holding on to the curtain with my right hand; had it just below the upper berth, just holding it below the upper berth and securing it on the board that separates the two berths and my left hand on my hip. The train gave an awful jerk and jolt and a terrible lurch. And I had my hand hold of the curtain just below the lower part of the upper berth, and held it up against the board that separates the two berths from one another, and my left hand on my hip, and this train gave a sudden violent lunge as though it stopped, and threw my whole body around and threw my head up against the edges of the upper berth with such force it knocked my head down on my shoulders and then it threw me with such force that it finally threw me to the floor."

Imogene said:

"This was the most extraordinary jerk, lurch and lunge and jolt that I have ever experienced. The sudden lurch, * * * swung her (Myrtle) around. She was trying to hang on to the curtain." Imogene scrambled to her feet, and according to her testimony, heard Myrtle moaning, and found her

"rocking back and forth in the aisle, saying 'Oh my head, Oh my head,'" etc.

She assisted Myrtle up and into the berth, rubbed her head, talked to her, helped her to undress and get to bed. There were no other eye-witnesses to these happenings.

The two ladies occupied the same berth and slept till nearly noon the next morning. Imogene says that upon awakening she found Myrtle paralyzed on her entire right side. Her face was drawn as if something had pulled it to one side, and she was uttering inarticulate sobs, crying, etc.

A doctor was not obtainable until the arrival of the train at Chicago. Myrtle Johnson was carried out of the Pullman, put in a wheel chair, taken to another station, and with her companion boarded the Santa Fe train to Kansas City. Upon her arrival there she was taken to Grace Hospital. According to Imogene Johnson "Up to this time Myrtle was unable to talk, one-half of her tongue being paralyzed."

The case was diagnosed as odema of the brain, resulting from injury, causing a partial paralysis of the right side.

The members of the train crew, *i. e.*, the conductor, porter, maid and brakeman, testifying for the railroad company, said they did not recall any unusual jar or sudden jerk at the time in question. It is sufficient to say that there was a square conflict of evidence as to the actual happenings. The evidence of these employees, who were not eye-witnesses, was necessarily of a negative character, nor was the matter called to their attention until sometime later. Separate verdicts were rendered in favor of Myrtle Johnson and Edward Johnson.

Thirty alleged errors in the conduct of the trial are set out in the specifications. Those requiring attention may be classified under three heads. 1. Refusal of the court to direct a peremptory verdict in favor of the defendant at the close of the plaintiff's case, and at the close of all the evidence. 2. The admission of incompetent evidence offered by the plaintiff. 3. Improper argument to the jury by counsel for the plaintiff. The specifications of error are practically identical in both cases.

1. **The sole question here is: Had the plaintiff established a prima facie case, and if so, was this situation changed at the conclusion of all the evidence?**

The plaintiff and her sister-in-law gave a most graphic description of the accident. That the plaintiff was thrown, and suffered injuries of a more or less grievous and permanent nature, is not disputed. So we inquire: Did the accident result from some unusual or extraordinary happening; such as a sudden stopping, starting or jerking of the train; beyond what might ordinarily be expected by passenger under all the surrounding circumstances, which include the usual and necessary starting, stopping, high rate of speed, inevitable rocking, swaying, etc., of the modern passenger train?

The plaintiff and her co-witness qualified by stating they had had wide experience in traveling on railroad trains of a similar nature and kind. We see no reason why they were not competent to state in their own way just what occurred, and the results thereof. That a passenger on public conveyances is qualified to state his experiences, observations, and the phenomena ordinarily incident to a railroad journey, such as testified to by these two ladies, has long been settled. The usual movements of a train, referred to above, do not constitute negligence, and the risks thereof are assumed by the passenger. The plaintiff's evidence is that this particular accident resulted from a slackening and jerk, or swaying of a most extraordinary and unusual character.

Counsel discuss the doctrine of res ipsa loquitur, "the thing itself speaks." The Federal courts have decided that it applies to cases of this character. That is; the train being under the sole control of the carrier and a passenger is injured without negligence on his part, a presumption based on past experience arises, that the occurrence was an unusual one, and would not have happened had the carrier used that high degree of care in operating the train that the law imposes upon it. It therefore follows in the instant case that

the plaintiff having made a prima facie case, a legal presumption arises under the doctrine above mentioned in favor of the plaintiff, which it became incumbent upon the defendant to explain or meet, but not necessarily by a preponderance of the evidence, because the burden of proving negligence is at all times upon the plaintiff. *San Juan Light & Transit Co.* v. *Requena*, 224 U. S. 89; *Sweeney* v. *Erving*, 228 U. S. 233; *William B. Stokes* v. *Francis Saltonstall*, 13 Pet. 181; *Cincinnati, N. O. & T. P. Ry. Co.* v. *South Fork Coal Co.*, 139 Fed. 528; *Railroad Company* v. *Pollard*, 22 Wall. 341; *Transportation Company* v. *Downer*, 11 Wall. 129; *Cleveland, Cincinnati, Chicago & St. Louis Ry. Company* v. *Hadley*, 16 L. R. A. (N. S.) 527, 82 N. E. 1025. This it attempted to do, and thus made an issue of fact for the jury under proper instructions. The court told the jury that the railroad company was not an insurer of the safety of its passengers; that the latter are not entitled to recover damages merely by showing they were injured; that the carrier was only liable for negligence in exercising that high degree of care that the law imposes upon it; and that there could be no recovery unless the jury found by a preponderance of the testimony that the injury was caused by an extraordinary and unusual lurching, etc., of the train, and not then, unless the same was caused by the defendant's negligence, and that the burden was upon the plaintiff to prove his case. The correctness of all this was not, for reasons we have stated, affected by the further instruction that if the injury was directly caused by an extraordinary lurching and jerking, the plaintiff need not go further and prove what negligence, if any, caused that lurching, the law presuming that an extraordinary occurrence of this kind was due to the fault of the carrier; but that this presumption was rebuttable, and not conclusive. *Mendelson* v. *Davis*, 281 Fed. 18; *Lee Line Steamers* v. *Robinson*, 218 Fed. 559.

The railroad company did not charge contributory negligence.

2. The several specifications under this heading are based upon objections made to hypothetical questions submitted to medical experts. These witnesses qualified professionally, and it was therefore proper to ask them what their judgment would be upon all, or any part of the facts that have some support in the record, provided a sufficient number of facts are assumed to enable the witness to give an intelligent opinion. The form of questions of this character rests largely in the sound discretion of the trial court, and may be so framed as to reflect the theory of the party propounding them. A question otherwise proper is not rendered improper for the reason that certain additional facts might have been put in which would assist such witness in giving a more satisfactory answer. The jury, no doubt, understood that these questions were hypothetical; that is, based on assumed facts, so there was no invasion of the peculiar province of the jury to decide the ultimate issues. A qualified physician or surgeon may state the results of specific occurrences on the body. *Wheeler* v. *Chicago & W. I. R. Co., et al.*, 108 N. E. 330, and the extent and character of the disability resulting therefrom, and whether certain conduct is consistent with having sustained particular injuries. *Scott* v. *The Homesteaders*, 129 N. W. 310.

Likewise, it has been held that an osteopath is competent to express an opinion on the injury or disease, and the treatment thereof. *Barnes* v. *Danville Street Ry.*, 235 Ill. 566; 22 C. J. 677; 22 C. J. 543; *Macon Ry. & Light Co.* v. *Mason*, 51 S. E. 569.

3. Both counsel for the plaintiff who addressed the jury, stated that the defense charged that:

"The vilest defense made in this case, a defense which would bar that girl from all society, intimated in this case that she had the syphilis. That is the defense in this case, that she had the syphilis."

And then proceeded to dilate on and exploit this text. We find no justification for this assumption, or for the verbal pyrotechnics that counsel were permitted to indulge in over the objections of the attorneys for the defendant. The defense put no witnesses on the stand to controvert the plaintiff's evidence that the plaintiff did not have syphilis. The only evidence counsel for the plaintiff cites as justifying their argument was the cross-examination of some of plaintiff's witnesses; but an affirmative defense of this character cannot ordinarily be proved by cross-examination. Moreover, defendant's interrogatories along this line were no more than a continuation of similar questions propounded on the direct examination. We therefore deem it proper to observe that this line of argument was likely to create prejudice, and did not aid the court or jury in the performance of their duties.

The record containing no reversible errors, the judgment in each of the two cases is *Affirmed.*